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ABSTRACT

The Family Educational Rights and Privacy Act (FERPA) provides students and parents access to their school records and requires that parents and adult students be informed of their rights under the act. FERPA also bars the release of records to third parties without written consent except to school district employees possessing legitimate interests and state and national educational research organizations. However, a category of student data known as "directory information" may be disclosed without written parental permission. Organizations conducting direct mail advertising and sales have sought student records based on state "sunshine laws" that require nonpersonal records to be open to the public. Several court decisions have interpreted FERPA as vesting school officials with discretion to deny disclosure of student lists for private exploitation and, in addition, ruled that the receipt of unwanted mail parcels as a result of merely filling out a school address form is an intrusion on a student's privacy. However, when faced with a student record disclosure issue, each administrator should check with local school counsel to see if a court or state administrative official has taken a contrary position. (MLF)

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A Legal Memorandum

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

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THE STUDENT'S PRIVACY: A DEVELOPING CONCEPT

Part One: Student Records

I Introduction

Since the beginning of this century the concept of individual privacy has been steadily expanding in American law. The effect of this growth on the educational field has been pronounced. This Memorandum will examine the developments in the field of student records. A second Memorandum will follow with a report on the impact of the increased concern for privacy on searches of students conducted in schools. Both Memos are intended to aid school administrators in achieving the twin objectives of protecting individual student privacy while simultaneously providing for the health, safety, and efficient education of all students.

II Student Record Policies

Two basic policies underlie laws regulating school records: (1) providing students and parents access to their school records; and (2) protecting the expectation of students and parents that student records will not be indiscriminately disseminated. This Memo will examine the role of principals and other administrators in implementing these objectives. Since the principal is usually considered the legal custodian of all student records, a working knowledge of the relevant legal concepts is of immediate importance.

III Legislative Aims and Actions

In response to perceived abuses in the school record-keeping process, both Congress and numerous state legislatures have enacted laws regulating the collection and release of school records. Their concerns were twofold. First, parents were frequently denied the opportunity to view records and

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thus participate intelligently in important educational decisions regarding their offspring. Second, these same records, containing possible inaccuracies, and at times even defamatory statements, were being disseminated to inappropriate persons both inside and outside the school and school system.

The preeminent law addressing these problems is the Family Educational Rights and Privacy Act (FERPA) 20 U.S.C., Sec. 1230, 1232 (g)-(i), sometimes called "The Buckley Amendment" after the then Senator James Buckley of New York who introduced it as an amendment to the 1974 General Education Provisions Act.

Generally speaking, FERPA grants parents, and students over 18 years of age the right to review the student's school records and correct or delete any misstatements therein. This includes making copies of records at reasonable cost to the parent of the student. FERPA also bars the release of records to third parties without written parental consent. The Act applies to all educational institutions receiving federal financial aid. The penalty for noncompliance may be termination of all federal education funds.

IV FERPA Requirements

The actions and procedures mandated by FERPA are not complex, but their effect is far-reaching.

1) Notice and Hearing Provisions

FERPA requires that parents and adult students be informed of their rights under the Act. These rights include notice of the types of records kept, and the procedures for inspecting and copying these records. The institution must also interpret or explain any information which is not readily intelligible. Parents must be made aware of their right to a fair hearing to challenge erroneous data, and the procedures for expunging such data, or inserting a rebuttal statement in a file when no change is made. Finally, parents and students should be made aware of their right to lodge a complaint with the Department of Education if the Act's mandates are not adequately implemented by the school district.

2) Definition of Educational Records

Congress defined "educational records" to include all materials directly related to a student which are maintained by a school. Specifically exempted from this definition are records and notes maintained by a teacher, administrator, school physician, or school psychologist for his or her own use, and which are not available to others. Records devoted to teacher or administrative personnel are similarly excluded.

3) Access to Records by Proper Authorities

Although prior written consent is required before information may be divulged to third parties, an exception exists for school district employees possessing legitimate interests in viewing the records, as well as officials in other schools in which the student seeks to enroll. When transferring records to a new educational institution, parents must be notified of the transfer, and of their right to review and contest the material. State and national educational organizations which require student data for confidential research and statistical purposes are also exempted from the parental consent prerequisite.

An exemption also exists for material under court order, although parents must be notified of the order. This exemption is a narrow one, and does not include general requests by police, court staffs, or probation officers, unless a state statute enacted prior to November 1974 specifies such release.

4) Consent Prior to Release

Dissemination of student record information to parties other than those included above may only occur with the consent of the parent or adult student. To expedite the flow of data to colleges, employers, and military authorities, a school district may prepare and distribute consent forms to students and parents. In order to comply with FERPA, such a form must include the name of each specific institution to which the information will be sent, and the purpose of the transfer, as well as an exact description of the records included. Consent forms which lack such specificity would not appear to meet FERPA's standards.

5) Directory Information

In order to accommodate the custom of including selected student information in materials such as honor rolls, sports, and play programs, and other student directories, FERPA creates a category of student data known as "directory information," which may include names, addresses, telephone listings, and dates of birth. Unlike other personal data in a student's records, a school may disclose directory information without first obtaining written parental permission. To do so, however, the school must provide public notice listing the types of data they intend to categorize as directory, and inform parents of their right to refuse to permit this data to be released about their student. If no parental objection is lodged, the information may then be released.

6) Possible Risks for Principals

The only method of enforcing FERPA is the threat of termination of federal funds. The Act may not be used as a basis for student suits against school

officials who fail to comply with the law's provisions. However, since FERPA guarantees students and parents access to their records, any data contained therein which is erroneous or defamatory might provide the basis for a libel or slander action. A student might also bring suit alleging his opportunity to attend college, or to get a particular job, has been adversely affected.

Principals are in the most exposed position since, as custodians of the records, they may be held liable for passing a statement along, even if they did not author the statement. For this reason, even though defense against defamation suits may be available, administrators should be wary of including in a pupil's record undocumented appraisals, conclusions, and opinions or observations which are extraneous to the process of education.[1]

V Public Access to School Records: "Sunshine" Laws

While Congress concerned itself with student and parental rights to control access to their files, some states enacted so-called "sunshine" laws intended to provide the general public with broad rights of access to all public records. In some cases, members of the public have sought recourse to these laws to gain access to information drawn from student records. The legislative concern with both the public's right to know, and the individual's right to privacy, generates some inherent and unintended inconsistencies and tensions. As custodians of their schools' records, principals are usually, albeit unwillingly, embroiled in the ensuing furor when privacy and access rights come into conflict.

1) Direct Mail Operations

The outside parties seeking student information do so with a variety of motives. A substantial number of requests are received from organizations and commercial enterprises conducting "direct mail" advertising and sales. The amount of these sales has been recently estimated as high as $50 billion per year.[2] The appropriation of school address lists for commercial purposes is not a new technique, and the NASSP took a strong stand against such activities as early as 1959. However, advances in computer technology now allow organizations to compile student directory information for a large school on a single computer tape. Direct mail firms are thus able to efficiently and inexpensively "blanket" the student population of a school with their messages. The inherent vulnerability of adolescents as undiscriminating consumers coupled with the sophistication of marketing campaigns, creates obvious opportunities for exploitation. The fact that school officials released student addresses may also be misconstrued as approval of the products or services advertised.

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1. See NASSP Legal Memorandum on Defamation, December 1982.
2. Ballard, Privacy and Direct Mail Advertising, 47 Fordham Law Review 495, 497 (1979).

2) Refusal To Disclose

The ability of administrators to refuse the requests of "mailers" may be somewhat constrained. FERPA only permits names and addresses to be released without parental consent as directory data, but state sunshine laws may require non-personal school records to be open to the public. This, at least, was the conclusion of one legal authority in interpreting the Iowa state law in conjunction with FERPA. There the Attorney General stated that the result was to require school officials to honor all requests for information about students already declared to be "directory." Iowa Attorney General Opinion, 80-6-8 (June 1980).

Similarly, the Michigan Court of Appeals recently held that FERPA does not bar the release of names and addresses for commercial mailing purposes, provided the school has classified the data as directory information. Kestenbaum v. Michigan State University, 294 N.W. 2d 228 (1980).

Yet, it is possible to interpret such provisions as requiring the opposite result: that school officials could lawfully choose to bar release of directory data to third parties, based on FERPA. The Act does not state that a school must disclose its directory data to all who request the information. In fact, when the Department of Education (then HEW) published its regulations to implement FERPA in 1976, it commented that nothing would preclude a school "from adopting a more restrictive policy regarding the disclosure of 'directory information'." 41 Fed. Reg. No. 118, p. 24669 (June 17, 1976). FERPA, therefore, seemingly vests school officials with discretion to deny disclosure of student lists for objectionable uses. Nor is such disclosure unalterably required by many sunshine laws.

3) The Impact of Sunshine Laws

Although the Michigan court in Kestenbaum v. Michigan State University, supra., did not bar disclosure of directory data based on FERPA, it did forbid its release as a result of its interpretation of federal and state freedom of information laws. The court noted these laws were never intended to require a public educational institution to relinquish commercially valuable property to a private party. In the court's view, the appropriation of publicly compiled lists for private exploitation would violate fundamental principles of law.

In addition, the receipt of unwanted mail parcels as a result of merely filling out a school address form is an intrusion on a student's privacy. Cf. Wine Hobby USA, Inc. v. IRS, 502 F 2d 133 (3rd Cir. 1974). The motivation behind the disclosure request is of pivotal importance in determining whether such an intrusion is justified. Since the use of address lists for commercial purposes was never intended by the legislatures passing sunshine laws, there is no justification for such an invasion of the student's privacy. Kestenbaum v. Michigan State, supra.

In contrast, when a request for records is motivated by a legitimate interest in improving education, such as scholarly study or research, courts are much less likely to block disclosure as an unwarranted invasion of privacy. See e.g., Kryston v. Board of Education, 430 N.Y.S. 2d 688 (1980).

VI Conclusions

At least in those jurisdictions in which legal authorities have not held FERPA or state sunshine laws to compel student record disclosure, it seems likely that a principal could successfully refuse to make directory data available to commercial enterprises. However, when faced with such an issue, each administrator should, if possible, check with local school counsel to see if a court or state administrative official has taken a contrary position. In this way an administrator may most equitably balance public access and individual privacy rights.

Research and drafting assistance on this Memorandum were carried out by NASSP Legal Intern William E. Vita, a student at Boston College Law School.

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